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Not all proofs created equal: Court of Appeals determines inadmissible proofs insufficient to create question of fact as to whether plaintiff suffered serious impairment of a body function

By: Paul Shkreli **March 21, 2016**

SECREST WARDLE NOTES

The Michigan Court of Appeals continues to issue favorable rulings in automobile negligence claims involving a MCL § 500.3135(5) and *McCormick* analysis. In another recent unpublished opinion, *Oehmke v Walker*, the Court of Appeals affirmed the trial court's ruling that letters from plaintiff's doctors could not establish a genuine issue of material fact as to whether the plaintiff suffered a serious impairment of body function. Even further, the Court ruled that the plaintiff's own affidavit regarding statements from medical professionals contained inadmissible hearsay and did not establish a question of fact

The *Oehmke* decision is one of many recent appellate rulings that favor the defense in automobile negligence actions. While most of the recent cases have focused on whether a plaintiff's general ability to lead his or her normal life was affected by the accident, *Oehmke* addresses whether a plaintiff has put forth sufficient evidence to establish an objectively manifested impairment.

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In *Shannon Oehmke v James Walker*, an unpublished Court of Appeals opinion issued on March 17, 2016, Ms. Oehmke alleged damages for bodily injury stemming from a November 4, 2012 automobile accident. The plaintiff primarily argued that the subject accident aggravated injuries she suffered in a previous, July 23, 2010 accident.

The plaintiff presented two unsworn letters from of her doctors, both indicating that she had suffered an exacerbation or worsening of her pre-accident symptoms. She also presented an affidavit signed by herself indicating that she suffered from multiple impairments and that she had relied on her doctors' statements regarding the role the November 4, 2012 accident had on those impairments. The defendant filed a motion for summary disposition arguing that Plaintiff had not suffered a serious impairment of a body function as a result of the 2012 accident and that the letters and affidavit did not create a question of fact sufficient to defeat disposition.

The trial court granted the defendant's motion for summary disposition, concluding letters from the plaintiff's doctors were inadmissible hearsay that did not establish a genuine issue of material fact and, nevertheless, were factually insufficient. Similarly, the trial court denied the plaintiff's counter motion for summary disposition, as the plaintiff's affidavit did not establish a question of fact that the 2012 accident caused an objectively manifested impairment.

Pursuant to the Michigan No-Fault Act, more specifically, MCL § 500.3135, a plaintiff must show, among other things, that she suffered an objectively manifested impairment. This means, "that the impairment must be 'evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function.'" *McCormick v Carrier*, 487 Mich 180 (2010).

In its analysis, The *Oehmke* Court noted that, while the parties disputed the nature and extent of the injuries allegedly suffered in the subject accident, they agreed the trial court could determine whether the plaintiff sustained a threshold injury. As such, the trial court properly determined that any factual dispute was not material to determining whether Ms. Oehmke sustained a threshold injury.

The Court of Appeals was unmoved by the plaintiff's proofs, noting her *subjective* assessment of worsening headaches did not establish an objectively manifested impairment. The Court was also undeterred by the plaintiff's attempt to establish an objectively manifested impairment through her own affidavit. In this affidavit, she stated she suffered impairment to her brain, arms, legs, and cognitive abilities, claiming her medical providers related her ongoing complaints to the subject accident. The Court of Appeals, citing *McCormick*, ruled plaintiff's affidavit did not present admissible evidence of "actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function."

Moreover, the Court of Appeals also affirmed the trial court's ruling that the unsworn letters submitted by two of Ms. Oehmke's doctors—claiming her pre-accident condition was worsened by the subject accident—did not establish a genuine question of fact. The trial court correctly ruled these documents inadmissible hearsay evidence, as they contained conclusory statements without proffering admissible evidence in support of the claims. Although the plaintiff did not properly preserve the argument on appeal, the Court of Appeals nevertheless rejected the plaintiff's arguments that the letter fit within an exception to the hearsay rule. In addition, the Court ruled that the doctors' letters were factually insufficient in that they could not create a question of fact since the letters did not, for example, provide that there was a physical basis for the plaintiff's subjective complaints of pain.

Ultimately, the Court of Appeals affirmed the trial court's decision that the plaintiff did not create a question of fact as to whether she suffered a serious impairment of body function in the 2012 accident. The *Oehmke v Walker* Opinion is another victory for the defense and, this time, provides persuasive support on the proofs needed to establish an objectively manifested impairment.

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